Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

79-1761

No. _____

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

Petitioner

~~On Appeal From The North Carolina Supreme Court~~

## PETITION FOR WRIT OF CERTIORARI

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STATE OF NORTH CAROLINA

v.

WAYNE SEAY

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**On Appeal From The North Carolina Supreme Court**

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## PETITION FOR WRIT OF CERTIORARI

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### 1. OPINIONS BELOW

The opinion of the North Carolina Court of Appeals affirming the convictions of Petitioner on two counts of embezzlement in the trial court, is attached as Exhibit A. The Order of the Supreme Court, dismissing Petitioner's Appeal as a matter of right based on constitutional issues and denying the Petition for Discretionary Review, is attached as Exhibit B.

## 2. JURISDICTION

The jurisdiction of this Court to review the decisions of the North Carolina Supreme Court and Court of Appeals is conferred by Title 28, United States Code, Section 1257(3). The Petitioner has preserved throughout this entire matter his constitutional challenge to the indictments.

## 3. QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's Sixth Amendment right to a speedy trial, via the Fourteenth Amendment, has been violated by a delay of nearly five years between the alleged criminal acts and actual indictments, when the delay resulted in irreparable prejudice to the preparation of his defense?

II. Whether Petitioner has been denied his constitutional rights to due process of law, via the Fifth and Fourteenth Amendments, where nearly five years elapsed between the alleged criminal acts and the indictments, Petitioner's defense was irreparably prejudiced, the State either intentionally or negligently failed to seek an indictment after knowing of the salient facts for nearly two years prior to seeking the indictment, and the District Attorney, testifying as a witness, misstated evidence prejudicial to Petitioner?

III. Whether the State must show a lack of prejudice to Petitioner's preparation of his defense to criminal charges when an inordinate and excessive delay of nearly five years transpired between the time of the alleged criminal acts and indictments, and, if so, whether the State has shown that Petitioner was not prejudiced by the delay?

## 4. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

Fifth (5th), Sixth (6th) and Fourteenth (14th) Amendments to the United States Constitution.

## 5. STATEMENT OF THE CASE

Petitioner, a resident of Winston-Salem, North Carolina, was secretary-treasurer of American Marketing Company, Inc., a North Carolina corporation, which was formed to develop real estate (Record, N.C. Court of Appeals, Page 14)*.

Mr. Roger Tise, a sales agent at that time for the company, had received a $500 investment from Mrs. Inez Poindexter (whom Petitioner learned several months later was the mother of Roger Tise), which Petitioner deposited in the corporate account (R.pp.14,15). Mr. Tise also received an investment from Mr. James Belton of $400. Mr. Belton's check was also deposited in the corporate account (R.p.15). Both of these transactions took place in early April, 1973.

Thereafter, a conflict between Mr. Tise and Mr. McLawhorn, president of the corporation, arose, because Mr. Tise wanted an advance on his commissions, which he alleged were due him (R.p.14).

Petitioner became ill in June, 1973, and was incapacitated for approximately six months (R.p.13). Because of Petitioner's physical condition and the possibility that he might not be able to develop the property, it was decided that it was not feasible to raise the money to develop the real estate.

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*A copy of the Record of the hearing on the Motion to Dismiss the indictments and the Trial Court's Order denying the Motion has been filed with the Office of the Clerk of the Supreme Court of the United States.

A check for $500 was made to Roger Tise to pay back Mrs. Poindexter (R.p.15). Mr. Tise was also instructed to return Mr. Belton his $400, and Petitioner took a receipt from Mr. Tise for same.

Because of Petitioner's health and the inability of the company to proceed with the projects, the company became inactive, and the lessor of the space rented by the company took possession of all the assets which were located in the office, including the books and records of the corporation (R.p.13). Petitioner made an effort thereafter to recover the books and records, and went to the office of the management company in control of the space leased by the corporation, but he was unable to recover any of the books and records (R.pp.13,14).

In February, 1976, Inez Poindexter contacted the Attorney General's Office about the money she had paid to American Marketing (R.p.23). She also wrote the office of the Secretary of State and told the officials there the circumstances surrounding the investment. She received correspondence from the Attorney General's office dated April 8, 1976, and later, correspondence from the Secretary of State's Office (R.p.21).

In September, 1976, Mrs. Poindexter contacted the District Attorney's Office in Forsyth County, North Carolina, and thereafter had a meeting with the District Attorney in September, 1976, and several telephone conversations concerning the investment (R.pp.21,22).

Two bills of indictment were returned on February 27, 1978 (R.pp.3-5) by the Forsyth County Superior Court (Winston-Salem) alleging that Petitioner embezzled the investments of Inez Poindexter and James Belton. (Prior to trial, counsel then representing Petitioner filed

a Motion to Dismiss the indictments, alleging violations of Petitioner's Federal and State constitutional rights (R.pp.11-12), because of the inordinate and undue delay between the alleged criminal acts and the indictments and the prejudice suffered by Petitioner because of the delay, among other reasons.)

The trial court denied Petitioner's Motion to Dismiss and found that the prosecution did not deliberately and unnecessarily cause delay for its convenience or any advantage of the State (R.pp.43,44).

Petitioner was tried and convicted on both counts of embezzlement and sentenced to sixty (60) days active time. His conviction was affirmed on appeal to the North Carolina Courts (see appendices A and B).

## 6. ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

### I. Whether Petitioner's Sixth Amendment Right To A Speedy Trial, Via The Fourteenth Amendment, Has Been Violated By A Delay Of Nearly Five Years Between The Alleged Criminal Acts And Actual Indictments, Where The Delay Resulted In Irreparable Prejudice To The Preparation Of His Defense?

Petitioner contends that he is entitled to the Sixth Amendment guarantee to a speedy trial, via the Fourteenth Amendment, and that this right was violated because of the delay of nearly five years between the alleged criminal acts and actual indictments, which delay resulted in the irreparable damage to Petitioner's presentation of his defense.

Petitioner is aware of this Court's opinion in *United States* v. *Marion,* 404 U.S.307, 30 L. Ed. 2nd

468, 92 S. Ct. 455 (1971), but stresses that in that case defendant neither demonstrated nor explained specific prejudice because of the delay. Moreover, this court cited as a basis for its decision the fact that defendants are protected from extreme pre-indictment delays by statutes of limitation. But North Carolina has no statute of limitation on felony cases. For these reasons, this case is not dispositive of the issue in the case at bar.

Petitioner contends that the word "accused" was not intended by the drafters of the Sixth Amendment to limit the constitutional guarantee of a speedy trial to ones formally charged. In support of that assertion, Petitioner would show the Court:

A. The right to a speedy trial is an important safeguard to limit the possibility that long delay will impair the ability of an accused to prepare a defense. *United States* v. *Ewell,* 383 U.S. 116, 120 (1966).

Although certainly not binding on this court, the reasoning of former North Carolina Chief Justice Susie Sharp, a highly respected jurist, in *State* v. *Johnson,* 275 NC 264, 167 SE2d 274 (1969), on this issue is instructive: After noting that the guarantee of a speedy trial imposes the only limitation upon purposeful and oppressive delay between the date of the felonious offense and the commencement of the prosecution, Justice Sharp, writing for the court, stated, 275 at

> "We can see little, if any, difference in the dilemma which unreasonable delay creates for the suspect who was belatedly charged, the accused named in a warrant promptly issued but belatedly served, and the indicted defendant whose trial has been unduly postponed. The same considerations which impel prompt action in the one situation are equally critical in the others. 'Indeed, a suspect may be at a

> special disadvantage when complaint or indictment or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. . .' *Nickens* v. *United States, supra,* 323 F.2d at 813 (concurring opinion)."

B. The Constitution is a document purposely brief, and the rights sought to be protected therein are sometimes subject to inpermissible limitations because of the difficulty in translating into a few words the scope of the right to be protected. Such is the case with the right to a speedy trial under the Sixth Amendment. That right is guaranteed to an "accused", and while a limited interpretation of that word is that one must be formally charged before that right can be invoked, such an interpretation discounts the argument that, assuming the Amendment seeks to protect anyone who has the standing to complain of prosecutorial delay in seeking an indictment, which Petitioner argues that it most certainly does, what other satisfactory language could have been used, considering the drafters' conceptual adherence to brevity?

C. Historically, British Courts did consider delay as a condition to issuance of an information.

The criminal prosecution, procedurally, was commenced by the filing of a lawsuit, and thereafter the filing of an application for a criminal prosecution or a rule nisi for similar procedure calling for the defendant to show cause why he should not be imprisoned. Thus in the English common law, an individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment. *United States* v. *Marion, supra* (Douglas, J., concurring opinion).

This Court held in *Dellingham* v. *United States,* 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975), that a defendant after arrest was an "accused", and a delay of 22 months between arrest and indictment could be considered on this issue. Petitioner would argue that when the State starts building its case against a defendant and focuses the full investigatory and prosecutorial powers of the State against the defendant, the defendant should be considered accused for the purposes of the Sixth Amendment.

D. Since the power to indict rests with the State, it controls when a cause might be submitted to the Grand Jury and when a formal charge against an individual can be made. To limit the vesting of an individual's right to a speedy trial to that point allows the State to circumvent completely that right by purposely delaying its submission of its case to the Grand Jury. Certainly this was not contemplated by the drafters of the Bill of Rights.

E. In *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 694, 86 S. Ct. 1602 (1966), this Court ruled that an individual, prior to formal charges, must be informed of the Sixth Amendment rights accorded to an "accused". This opinion clearly recognizes that an "accused", under the Sixth Amendment, is not merely one who is formally charged but clearly envelopes a large spectrum of individuals subject to the investigatory and prosecutorial powers of the State.

In the case at bar, nearly five years elapsed between the alleged criminal acts and the indictment. As a result of the delay, Petitioner was irreparably damaged in that documentary evidence necessary to his defense was destroyed in the interim. Moreover, the record indicates that the State was aware of the complaints by the pro-

secuting witnesses for two years prior to seeking an indictment. The State, therefore, either intentionally or negligently failed to seek an indictment for a constitutionally inpermissible period of time.

These facts are to be distinguished from *United States* v. *Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977), where this Court presumed good cause for delay and noted protection via statutes of limitation. Petitioner does not believe such good cause can be ascribed to the District Attorney on this record, and, as noted, the statute of limitation affords this Petitioner no protection.

To summarize, Petitioner contends that the Sixth Amendment right to a speedy trial applies to preindictment delay where a defendant's rights are prejudiced thereby, and that that right has been violated because of the inordinate delay of nearly five years between the alleged criminal acts and indictment, the prejudice to Petitioner because of that delay, and the State's intentional or negligent delay for nearly two years in seeking an indictment.

**II. Whether Petitioner Has Been Denied His Constitutional Right To Due Process Of Law, Via The Fifth And Fourteenth Amendments, Where Nearly Five Years Elapsed Between The Alleged Criminal Acts And The Indictments, Petitioner's Defense Was Irreparably Prejudiced, The State Either Intentionally Or Negligently Failed To Seek An Indictment After Knowing Of The Salient Facts For Nearly Two Years Prior To Seeking Indictment, And The District Attorney, Testifying As A Witness, Misstated Evidence Prejudicial To Petitioner?**

Petitioner contends that a delay of nearly five years between the alleged criminal acts and the indictments, coupled with irreparable prejudice to Petitioner's defense, and the intentional or negligent delay of the State to seek an indictment after knowing of the salient facts for nearly two years prior thereto, violated his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Clearly, the thrust of many of the constitutional guarantees afforded one ultimately charged with a criminal offense is the preparation of an adequate defense. (Sixth Amendment, United States Constitution). In all cases, excessive delay between the time of the alleged criminal acts and the trial hampers the effective presentation of testimony concerning words spoken and conduct taken. In cases involving alleged acts of embezzlement such as the case at bar, necessarily dependent upon the presentation of documentary evidence, one's difficulty in presenting an effective defense is compounded by the fact that the necessary documentary evidence is often destroyed when there is considerable delay between the alleged criminal acts and the trial. Such is the case at bar.

The State of North Carolina no doubt will contend that Petitioner's documentary evidence was destroyed before it was aware of the facts which ultimately led to Petitioner's indictment. But Petitioner would argue that nearly three and one-half years elapsed between the time of the alleged criminal acts and when Petitioner was contacted by the local District Attorney. Surely no businessman should be expected to maintain business records for that long period of time after business had ceased operations in the anticipation that a District At-

torney would suddenly take an interest in alleged "white collar crimes" and seek to prosecute him nearly five years after the alleged criminal acts. This Petitioner has no statute of limitations to protect him.

Petitioner also argues that the State either intentionally or negligently failed to present its case to the Grand Jury until nearly two years after learning of the salient facts, and the District Attorney, while testifying as a witness, misstated evidence to the jury which prejudiced Petitioner.

Donald K. Tisdale, the District Attorney in Forsyth County, North Carolina, where the case was tried, testified at the trial on the merits (R.pp.80-83), although perhaps the more prudent course would have been to withdraw his staff from prosecution of the case. Mr. Tisdale testified that he had talked with Petitioner by telephone and that he had found his telephone number in the telephone book (R.p.83). Yet the uncontradicted evidence is that Petitioner *never* had his phone number listed in the telephone book.

Mr. Tisdale also testified that Petitioner told him he owed the money to Mrs. Poindexter and that he would pay it back, which testimony directly contradicts Petitioner's defense.

While Mr. Tisdale's misstatement appears minor, the Court must know that the jury accorded his testimony great weight, and the District Attorney's willingness to testify falsely as to this fact and otherwise playing "fast and loose" with the facts, quite obviously could have affected the jury's verdict. Because of the significant prejudice to Petitioner, Petitioner believes he has not been accorded due process of law. *See Mooney* v. *Holohan,* 294 U.S. 103, 79 L. Ed. 791. 55 S. Ct. 340

(1935) and *Pyle* v. *Kansas,* 317 U.S. 213, 87 L. Ed. 214, 633 S. Ct. 177 (1942).

In summary, Petitioner's right to due process of law, as is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, was violated because of the inordinate delay of nearly five years between the alleged criminal acts and indictments, the prejudice suffered to Petitioner by the delay, the State's intentional or negligent failure to present its case to the Grand Jury for nearly two years after learning the salient facts, and the District Attorney's misstating of the evidence.

**III. Whether The State Must Show A Lack Of Prejudice To Petitioner's Preparation Of His Defense To Criminal Charges When An Inordinate And Excessive Delay Of Nearly Five Years Transpired Between The Time Of The Alleged Criminal Acts And Indictments, And, If So, Whether The State Has Shown That Petitioner Was Not Prejudiced By The Delay?**

A delay of four years or more in securing an indictment, nothing else appearing, is an unusual and undue delay. *United States* v. *Lustman,* 258 F. 2d 475 (2d Cir. 1958), *cert. denied,* 358 U.S. 880, 3 L. Ed. 2d 109, 79 S. Ct. 118 (1958). A delay of seven months prior to bringing charges has been held an inpermissible period. *Ross v. United States,* 121 U.S. App. D.C. 233, 349 F. 2d 210 (1965).

Petitioner contends that the Due Process Clause of the Fifth Amendment, and the Sixth Amendment, via the Fourteenth Amendment, require the State to have the burden of proof to establish that the unusual and undue delay between the alleged criminal acts and the

indictments is not prejudicial to Petitioner, and that the State has not made that showing on this record. Petitioner believes that the State should have the burden of proving lack of prejudice to discourage and prevent the State from deliberately and intentionally delaying the presentation of its case to the Grand Jury.

While Petitioner recognizes that any arbitrary standard denies the court some flexibility in this area, Petitioner would contend that if a lapse of four years between the alleged criminal acts and indictments is, on its face, an unusual and undue delay, Petitioner should not have to bear the burden of showing the absence of prejudice.

## 7. CONCLUSION

For the foregoing reasons, Petitioner believes his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## EXHIBIT A

COURT OF APPEALS OF NORTH CAROLINA

No. 7921SC647

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

Dec. 18, 1979

Defendant was charged in two bills of indictment with embezzlement of funds from Inez Poindexter and James Belton. In April, 1973, James Belton, Inez Poindexter and at least one other were solicited by Roger Tise to make investments in Salem Properties, a limited partnership, which would be formed once sufficient capital was raised and which would make investments in real property. The general partner for this limited partnership was to be American Marketing Corporation. Robert McLawhorn was president and defendant was secretary-treasurer of the general partner corporation. Tise was hired and trained by McLawhorn to solicit capital for the limited partnership. The evidence is in dispute on whether his compensation was to be a salary with a 10% commission for sales or a straight 10% commission. He did receive one check for $500.00 which was designated a "commission advance" and which was drawn on Intercapital Corporation of which defendant was president and McLawhorn was secretary-treasurer.

Poindexter and Belton were provided with subscription letters, power of attorney forms and copies of a partnership agreement for Salem Properties which designated American Marketing Corporation as general partner. Partnership subscriptions were in $100.00 units, and the agreement of partnership was not to become effective or to be recorded with the register of deeds until a minimum of $50,000.00 in capital was raised. The agreement also provided that "[t]he general partner agrees that it will, in the name of the partner-

ship, jointly open and thereafter maintain in a North Carolina bank a bank account or accounts in which shall be deposited all contributions of the partners and all other partnership income and that it will use such funds solely for the business of the partnership." Poindexter contributed $500.00 on 6 April 1973 and Belton contributed $400.00 on 2 April 1973 to the Salem Properties investment explained to them by Tise. Both delivered checks to Tise made payable at his instructions to "American Marketing Corporation, General Partner." Both checks were delivered by Tise to defendant. The checks were cashed and endorsed "For deposit only, American Marketing Corporation by Wayne Seay." Tise was fired shortly after these solicitations were made.

In the latter part of 1973, Poindexter began inquiring of defendant about her investment. She was given his phone number by Tise who was her son. She called him every month or so about returning the money and was given assurance that he was working on everything and would "get things a-goin'." In March or April, 1975, Tise talked with Seay about the investments and was assured that they were safe but not reachable. In February, 1976, Poindexter consulted an attorney and made a written complaint to the Attorney General in Raleigh. In September, 1976, she saw the district attorney for the twenty-first judicial district. The district attorney wrote defendant a letter and defendant responded by phone in November, 1976. Defendant acknowledged receipt of the money and gave excuses of ill health and promised to repay in thirty days. Belton and Poindexter hired an attorney who also reached defendant. He told their attorney he was financially unable to repay at that time but promised to contact the attorney again within a week about the matter. He never did. The SBI began an investigation in 1977. A limited partnership known as Salem Properties with the general partner being American Marketing Corporation was never registered nor formally created. Poindexter and Belton were never reimbursed nor repaid for their contribution. Indictments were brought against defendant on 27 February 1978 for embezzlement from Poindexter and Belton.

Defendant presented evidence through the testimony of Robert McLawhorn that he and defendant concluded after firing Tise that the investment solicitations made by Tise which totaled $1,000.00 should be returned. They accordingly sent Tise a letter instructing him to use the commission advance to repay Poindexter, his mother. The letter contained $500.00 in cash with which he was to reimburse Belton and another subscriber for their contributions to the Salem Properties venture.

The jury returned verdicts of guilty and judgments were entered thereon. Defendant appeals.

Atty. Gen. Rufus L. Edmisten, by Sp. Deputy Atty. Gen. David S. Crump, Raleigh, for the State.

Morrow, Fraser & Reavis by John F. Morrow, Winston-Salem, for defendant-appellant.

VAUGH, *Judge*

Defendant first assigns error in the denial of his pretrial motion to dismiss for denial of his right to a speedy trial embodied in the Sixth Amendment of the United States Constitution applicable to the states through the Fourteenth Amendment and the Eighteenth Section of the First Article of the North Carolina Constitution. Almost five years had passed from the alleged embezzlements in April, 1973 until the 27 February 1978 indictments.

Such a long period of time, nothing else appearing, constitutes unusual and undue delay.

> "[W]hen there has been an atypical delay in issuing a warrant or in securing an indictment and the *defendant shows* (1) that the prosecution deliberately and unnecessarily caused the delay for convenience or supposed advantage of the State; and (2) that the length of delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed." *State* v. *Johnson,* 275 N.C. 264, 277, 167 S.E.2d 274, 283 (1969) (emphasis added).

The circumstances of each case are controlling but factors to be considered by a court in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant and (4) prejudice to the defendant. *State* v. *McKoy,* 294 N.C. 134, 240 S.E.2d 383 (1978). *State* v. *Johnson, supra.* In this case, defendant has not shown a deliberate and unnecessary delay caused by the State resulting in a reasonable possibility of prejudice to defendant.

The only possible prejudice shown by defendant at the hearing on the motion was that all records for the varied companies and partnerships he was involved in were lost when the building owner repossessed the business office for all the companies sometime in July or August of 1973. This loss of evidence was not caused or in any way contributed to by the handing down of an indictment in early 1978.

For the first three years of this time span, defendant gave assurance to his alleged victims that the money was safely invested. Not until February of 1976 was any official of the State of North Carolina informed of or complained to in regard to the Poindexter and Belton investments. In September, 1976, the local district attorney received the information and contact was made with defendant. In early November, 1976, he promised the district attorney he would repay the money and was given thirty days to do so. Thus, until early December, 1976, any delay in bringing defendant to trial lies squarely on his shoulders.

In April of 1977, ancillary to an investigation of another set of corporations and partnerships in which defendant was involved, information the local district attorney had on the Poindexter and Belton investments was turned over to the White Collar Crime Unit of the SBI. Because of a heavy caseload, this unit did not begin investigating these particular embezzlements by defendant until October, 1977. Bank records involving the Poindexter and Belton payments were not received until January of 1978. Indictments were brought

the next month. The only possible prejudicial delay of these facts was from December, 1976, a time by which defendant was to repay the investors, until February, 1978, a period of little more than a year which was not a period constituting prejudicial delay in defendant's case. It was a reasonable period for investigation particularly in light of the many and varied business and legal entities surrounding defendant.

Thus, looking at the four factors we are to consider according to *State* v. *McKoy, supra,* and *State* v. *Johnson, supra,* the facts and circumstances of this case present the following: (1) the length of the delay because of defendant's own assurances that he would repay was not a period of five years but really little more than a year; (2) defendant's own promises of repayment along with a heavy SBI caseload the the complicated nature of this case caused the delay; (3) the defendant's own assurances constituted a waiver of most of the time span when an indictment could have been brought and (4) no prejudice has been shown by defendant.

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State* v. *Johnson,* 275 N.C. at 269, 167 S.E.2d at 278; *see also State* v. *Wright,* 290 N.C. 45, 224 S.E.2d 624 (1976), *cert. den.,* 429 U.S. 1049, 50 L.Ed.2d 765, 97 S.Ct. 760 (1977).

The trial court properly denied the motion.

Defendant's other assignment of error deals with the jury instruction on the definition of fiduciary. Defendant was charged with embezzlement in violation of G.S. 14-90 which provides:

> "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or *any other fiduciary,* or any officer or agent of a corporation, or any agent, con-

> signee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny." (Emphasis added).

The words "or any other fiduciary" were added by amendment in 1939 to enlarge the scope of the statute after a restrictive reading by the Court in *State* v. *Whitehurst,* 212 N.C. 300, 193 S.E. 657 (1937) and *State* v. *Ray,* 207 N.C. 642, 178 S.E. 224 (1935). *See State* v. *Ross,* 272 N.C. 67, 157 S.E.2d 712 (1967). Embezzlement in violation of this statute is made up of four elements: (1) the defendant must be the agent of the prosecutor; (2) by terms of his employment, office or other fiduciary relationship he was to receive the property of his principal; (3) that he received the property in the course of his employment, office or other fiduciary relationship and (4) knowing it was not his own, he converted it to his own use or fraudulently misapplied it. *See, e.g., State* v. *Ellis,* 33 N.C. App. 667, 236 S.E.2d 299, *cert. den.,* 293 N.C. 255, 236 S.E.2d 708 (1977). In this case, defendant was in a fiduciary relationship. He was a promoter of a limited partnership in which the prosecutors of this case, Poindexter and Belton, invested. Behind a corporate front, he was in charge of investing the money in real property. He received and deposited their money in the account of a corporation of which he was secretary-treasurer and which he had designated to be general partner for the limited partnership. The money was not invested as promised and was not returned to those

who invested it. Defendant's promises, promotions, receipt and disbursement of money, and his position in American Marketing Corporation gave him a fiduciary relationship with the investors. the funds was misapplied before the partnership was formed. No partnership property was embezzled. The investments of Poindexter and Belton were instead embezzled and they were embezzled by one in a fiduciary relation to them. *See* Annot. 82 A.L.R.3d 822, 851-54 (1978). Defendant's actions were encompassed in the "any other fiduciary" part of the statute.

"Fiduciary" thus became a crucial term in the case. The trial court instructed "a fiduciary is defined in law as a person having a duty created by his undertaking to act primarily for another's benefit." This definition was adequate for the case. Courts have been hesitant to define the term as is the case with the term "fraud" for fear one may escape the consequences of his actions for failure to meet a technical definition. We reecho this today and in approving the trial court's wording by no means declare its wording the definition of fiduciary. Our Courts have said:

> "The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust,* but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' " *Abbitt* v. *Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (citations omitted).

The wording of the instruction in this case was similar to this and adequate.

No error.

WEBB and HARRY C. MARTIN, JR., concur.

## EXHIBIT B

SUPREME COURT OF NORTH CAROLINA

Fall Term 1979

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

**Judgment Dismissing Appeal On Motion Of Attorney General And Denying Petition For Discretionary Review**

(7921SC647)

(filed February 15, 1980)

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G.S. 7A-30, upon the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 6th day of February 1980 that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

This Court's order of 9 January 1980 temporarily staying execution of judgment is dissolved.

/s/ CARLSON, J.
Carlson, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 14th day of February, 1980.

/s/ JOHN R. MORGAN
John R. Morgan
*Clerk of the Supreme Court*
*of North Carolina*

cc: North Carolina Court of Appeals
David S. Crump, Special Deputy Attorney General
Morrow, Fraser & Reavis, Attorneys at Law
Donald K. Tisdale, District Attorney
A. E. Wellburn, Clerk of Superior Court